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TRANSAMERICA LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DCD PARTNERS, LLC, a California
limited liability company; PERSONAL
INVOLVEMENT CENTER, LLC, a
Nevada limited liability company; and
REVEREND DR. J. BENJAMIN
HARDWICK, as trustee of the
PERSONAL INVOLVEMENT
CENTER TRUST NO. 1,

Plaintiffs,

v.

TRANSAMERICA LIFE INSURANCE
COMPANY, a corporation,
TRANSAMERICA LIFE INSURANCE
COMPANY, successor in interest to
TRANSAMERICA OCCIDENTAL
LIFE INSURANCE COMPANY; and
DOES 1-10,

Defendants.

Case No. 2:15-cv-03238-CAS-AJWx

**TRANSAMERICA LIFE
INSURANCE COMPANY'S
SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION IN
LIMINE NO. 1 TO EXCLUDE
EXPERT OPINIONS NOT IN
REPORTS**

Hon. Christina A. Snyder

Hearing Date: August 14, 2017
Hearing Time: 11:00 a.m.

Pretrial Conference: August 14, 2017
Trial: August 29, 2017
Complaint Filed: March 18, 2015

REDACTED VERSION OF DOCUMENT
PROPOSED TO BE FILED UNDER SEAL

1 Defendant Transamerica Life Insurance Company (“TLIC”) submits this
2 supplemental brief in support of its Motion *in Limine* (“MIL”) No. 1 to exclude
3 expert opinions that are not in the initial October 2016 reports of Plaintiffs’ experts
4 Vincent J. Granieri (ECF No. 264-1) and Robert S. Cauthen, Jr. (ECF No. 265-1).
5 On July 24, in response to MIL No. 1 and *after* the parties filed their pre-trial
6 disclosures, Plaintiffs filed and served untimely supplemental reports from these
7 experts without leave of court. (ECF Nos. 290-3, 290-4.) Those reports and any
8 opinions therein should also be stricken.

9 LEGAL STANDARD

10 Rule 26(e) permits supplementation of expert reports when:

11 *a party’s discovery disclosures happen to be defective in*
12 *some way so that the disclosure was incorrect or*
13 *incomplete and, therefore, misleading. It does not cover*
14 *failures of omission because the expert did an*
15 *inadequate or incomplete preparation.* To construe
16 supplementation to apply whenever a party wants to
17 bolster or submit additional expert opinions would
[wreak] havoc in docket control and amount to unlimited
expert opinion preparation.

18 *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (emphasis
19 added) (internal citations omitted). If a supplemental expert report “falls outside
20 the scope of Rule 26(e),” it must comply with the discovery schedule set by the
21 Court or, alternatively, be permitted after requesting and receiving a Rule 16
22 continuance from the Court.¹ Scheduling orders “may be modified only for good

23 ¹ Under Rule 26(e), the “duty to supplement” contemplates testimony used to
24 correct errors, not new opinions offered to bolster prior reports. *See Tesoro Ref. &*
25 *Mktg. Co. LLC v. Pac. Gas & Elec. Co.*, Case No. 14-cv-00930-JCS, 2016 WL
26 158874, at *9 (N.D. Cal. Jan. 14, 2016). Where an untimely supplemental report
27 “simply adds new analysis . . . [of] a topic that [the expert] had previously declined
28 to address in his initial Report, Rebuttal Report, or deposition,” it “falls outside the
scope of Rule 26(e).” *Id.* at *11. Additionally, supplemental reports fall outside
Rule 26(e) when the plaintiff had “not asked [the expert] to perform the analysis”
earlier, even though it could have. *Pac. Info. Res., Inc. v. Musselman*, No. C06-
2306 MMC (BZ), 2008 WL 2338505, at *1 (N.D. Cal. June 4, 2008).

1 cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Modification
2 focuses on the diligence of the party seeking relief from a deadline. *Johnson v.*
3 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992). If the party
4 seeking relief "was not diligent, the inquiry should end." *Id.*

5 **I. MR. GRANIERI'S JUNE 17 DECLARATION AND JULY 24 REPORT**
6 **ARE IMPROPER SUPPLEMENTATIONS UNDER RULE 26(e)**

7 Mr. Granieri's June 17 Declaration and July 24 Report present several new
8 opinions never before pled and bolster his previous opinions, placing the
9 supplementations outside the scope of Rule 26(e). Fed. R. Civ. P. 26(e); *Rojas v.*
10 *Marko Zaninovich, Inc.*, No. CIV-F-09-0705 AWI JLT, 2011 WL 6671737, at *5
11 (E.D. Cal. Dec. 21, 2011) (barring supplementation because Rule 26(e) only allows
12 it to clarify incomplete or incorrect opinions that are misleading) (citing *Akeva*
13 *L.L.C.*, 212 F.R.D. at 310).

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] His untimely
20 opinions are outside the scope of supplementation because they are new opinions or
21 designed to bolster, not correct or complete opinions that are otherwise misleading.
22 *Akeva L.L.C.*, 212 F.R.D. at 310.

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]. (NOL, Ex. 4 ¶ 5; ECF No.
27 290-3 ¶¶ 8, 9 n.7, 12-14.)
28

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] (*See id.*) Moreover, he cites only a single document that was
7 produced before the initial discovery cut-off in December 2016, without explaining
8 why that document required corrective action seven months later. (*Id.* at ¶ 42 n.43.)
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] (ECF No. 290-3 ¶¶ 20-25, 36.) This new theory is not a correction to
12 his previous testimony, nor was it ever pled. (*See* ECF No. 40, SAC.) Moreover,
13 the documents he cites to support this new theory were all produced before the
14 initial discovery cut off in December 2016. (ECF No. 290-3 ¶¶ 20-22 n. 23-n. 29.)

15 **II. MR. CAUTHEN'S JUNE 17 DECLARATION AND JULY 24 REPORT**
16 **ARE IMPROPER SUPPLEMENTATIONS UNDER RULE 26(E)**

17 Mr. Cauthen's June 17 Declaration (ECF No. 210-3) and July 24 Report
18 (ECF No. 290-4) are outside the scope of Rule 26(e) because they raise new
19 theories and bolster previous opinions, which he readily admits. [REDACTED]
20 [REDACTED]

21 [REDACTED] (NOL, Ex. 7, Cauthen
22 Dep, at 17:20-22.) [REDACTED]
23 [REDACTED] (*Id.* at 25:12-21.) [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED].² (*Id.* at 129:8-132:23.) [REDACTED]

27 ² The MSJ was filed January 27, 2017 (*see* ECF No. 145). Mr. Cauthen fails
28 to explain why he waited nearly six more months before disclosing it on June 17.

[REDACTED] (Id. at 143:24-144:22; 146:15-22.)

For example, Mr. Cauthen's July 24 Report [REDACTED]

[REDACTED] (ECF No. 290-4 ¶ 22.) [REDACTED]

[REDACTED] (NOL, Ex. 7, at 152:17-155:21; 161:22-162:9.)

Mr. Cauthen relies almost exclusively on documents produced in 2016 or January 2017 and a publicly available 2011 deposition transcript in an unrelated case. (ECF No. 290-4 ¶¶ 24, 27, 30.) He cannot supplement his initial report to bolster, alter, and embolden his original opinions using documents that were available to him more than six months prior. *Rojas*, 2011 WL 6671737, at *5 (barring supplementation where "[t]he information was clearly available" many months before).

III. PLAINTIFFS DID NOT OBTAIN LEAVE UNDER RULE 16 TO SERVE ADDITIONAL EXPERT OPINIONS

Plaintiffs did not seek leave to serve supplemental expert opinions nine months after the expert report deadline, much less exercise diligence in doing so. The inquiry should end the reports at issue should be excluded. *See Tesoro Ref. &*

1 *Mktg. Co. LLC*, 2016 WL 158874, at *11.³

2 Even assuming TLIC should have known the July 24 Reports were
3 forthcoming once they received Messrs. Granieri's and Cauthen's declarations on
4 June 17, 2017, such "notice" hardly shows diligence. The July 24 Reports were
5 prepared and served only in response to TLIC's MIL No. 1 regarding the June 17
6 Declarations and Plaintiffs' failure to properly disclose their expert opinions. (ECF
7 No. 247.) Moreover, the July 24 Reports, which contained new opinions not
8 present in the declarations and additional bolstering of inadequate opinions, were
9 served more than a month after the June 17 Declarations were filed, after pretrial
10 disclosures were made, after TLIC's actuarial expert was deposed, and only five
11 weeks before trial with no notice. This timeline demonstrates "carelessness . . . and
12 offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609.

13 **IV. TLIC WOULD SUFFER PREJUDICE IF PLAINTIFFS ARE**
14 **PERMITTED TO INTRODUCE THESE UNTIMELY OPINIONS**

15 The case is going to trial in two weeks, and just a month after Plaintiffs
16 served the supplemental expert reports, often addressing issues never pled. TLIC
17 would face substantial prejudice were Plaintiffs' experts are permitted to offer these
18 new untimely opinions in trial. Moreover, the probative value of the new testimony
19 is outweighed by the prejudicial impact on TLIC. Fed. R. Evid. 403. (ECF No.
20 247.) Therefore, TLIC respectfully requests the Court grant MIL No. 1 to exclude
21 the expert declarations and supplemental expert reports of Messrs. Granieri and
22 Cauthen.

23
24
25 ³ Plaintiffs attempt to establish diligence by setting forth the broad discovery
26 timeline in this case. (ECF No. 291-1 ¶¶ 3-8.) The mere fact that discovery was
27 continued for other, "limited purposes" (ECF No. 191) does not allow Plaintiffs to
28 make an end run around the expert report deadlines. If Plaintiffs' experts believed
they needed additional discovery to fully opine on any issue, they should have so
stated. They did not. Instead, they included—and rely on—a general reservation of
rights to supplement their reports in the future if new information is gleaned,
subject to court approval.

1 Dated: August 12, 2017

MORRISON & FOERSTER LLP

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3 By: /s/ Mark C. Zebrowski
4 Mark C. Zebrowski

5 Attorneys for Defendant
6 TRANSAMERICA LIFE
7 INSURANCE COMPANY
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